THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY
NO. 2015-SC-000247-DE

A.H., APPELLANT,

v.

ON APPEAL FROM COURT OF APPEALS
NO. 2014-CA-001240-ME
KENTON CIRCUIT COURT CASE NO. 14-AD-00080

W.R.L., *et al.* APPELLEES.

BRIEF OF APPELLANT A.H.

Respectfully submitted,

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CERTIFICATE REQUIRED BY KY CR 76.12(6)

I certify that copies of this *Brief of Appellant A.H.* were served upon the following by Federal Express on September 10, 2015: Amy H. Anderson, 2493 Dixie Highway, Ft. Mitchell, KY 41017; Jacqueline S. Sawyers, 2493 Dixie Highway, Ft. Mitchell, KY 41017; Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Chief Judge Acree, Kentucky Court Of Appeals, Tate Building, 125 Lisle Industrial Avenue, Suite 140, Lexington, KY 40511-2058; Hon. Debra Hembree Lambert, Kentucky Court of Appeals, Pulaski County Court of Justice, 50 Public Square, Suite 3808, Somerset, Kentucky 42501; Hon. Irv Maze, Kentucky Court of Appeals, 700 W. Jefferson St., Suite 1010, Louisville, KY 40202-4724; and Hon. Lisa O. Bushelman, Kenton Circuit/Family Court Judge, Kenton County Justice Center, 230 Madison Avenue, Covington, KY 41011. I also certify that ten (10) copies of this *Brief of Appellant A.H.* were filed pursuant to Ky. CR 76.40 via Federal Express overnight delivery.

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INTRODUCTION

In granting Appellant A.H.'s motion to intervene in the stepparent adoption action involving the child L.H., the Kenton Family Court cited a "litany of proof" that there was an agreement between A.H. and her former lesbian partner, Appellee M.L., to co-parent the child, which the court found to provide A.H. with a viable claim of custody that warranted consideration before M.L.'s current husband, Appellee W.R.L., could be permitted to adopt the child. The Court of Appeals reversed, even though it did not disagree that A.H. and M.L. had an agreement to co-parent, instead relying on a host of issues never raised by Appellees, and either omitting or misapprehending this Court's most relevant precedents and the applicable statutes.

STATEMENT CONCERNING ORAL ARGUMENT

A.H. requests oral argument, given the public importance of preserving the relationships children have with their nonbiological parents and the need to address fully those objections to intervention, if any, that are deemed by this Court to have been introduced properly into this litigation by the Court of Appeals.

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STATEMENT OF THE CASE

This case arises out of a dispute in which A.H. notified M.L. that she was filing for custody, M.L. hurriedly filed a stepparent adoption petition, and A.H. followed with the promised custody action days later. A.H.'s custody petition is premised on the fact that she and M.L. had agreed to have and co-parent a child together when they were in a committed, same-sex relationship, and that the parties acted in accordance with that agreement for years—both before and after their breakup—creating a bonded child-parent relationship between the child and A.H. that cannot be severed without lasting harm to the child. M.L. is now married to W.R.L., who is seeking to adopt the child whom M.L. co-parents with A.H. A.H. sought to intervene in and dismiss the adoption proceeding to ensure that she would be heard regarding her claim that the best interests of L.H. require her being awarded joint custody.

A.H. And M.L. Agree To Have A Child Together.

A.H. and M.L. were in a committed same-sex relationship for well over five years. They began dating in August 2005, and moved into A.H.'s home in October 2005. They lived together in Cincinnati, Ohio, until they separated in 2011. (R p.10.)

In 2005, A.H. and M.L. decided to have a child together and that M.L. would be the one to attempt pregnancy. (R p.10.) They selected a sperm donor, Kelly Phillips, a male friend of M.L.'s sister. (R p.11.) Mr. Phillips signed a document drafted by M.L. that stated that he "donated sperm to [M.L.] and [A.H.] on January 1, 2006, with the intent for them to create a child and raise the child as there [sic] own . . . . [A.H.] is the other parent to the unborn child and I will not contest that in court if in fact I ever find out that the child is mine." (R pp.11 and 17.)

M.L. was artificially inseminated on December 31, 2005. A.H. was present for the insemination. (R p.11.) M.L. became pregnant. (R p.11.) A.H. was involved in every aspect of the couple's decision to become pregnant and supported A.H. throughout the pregnancy. (R p.11.)

L.H. was born on September 29, 2006, in Hamilton County, Ohio. (R p.11.) A.H. was at the delivery and cut the umbilical cord. (R p.11.) The child has A.H.'s middle and last names. The child's first name is A.H.'s maternal grandmother's maiden name. (R p.11.)

After the child's birth, A.H. was the child's co-parent. A.H. took six weeks off from work to care for her. (R p.11.) A.H. has been involved in all aspects of the child's life, including taking her to doctor's appointments, caring for her when she was sick, selecting child care providers, attending school events and other special events, providing child care and child rearing responsibilities, and providing financial support. (R p.11.) A.H. is listed as a parent on medical and childcare forms and school documents. (R p.12.) A.H. covers the child as a dependent on her health insurance plan. (R p.12.) In 2010, M.L. allowed A.H. to claim the child as a dependent on her tax returns. (R p.12.)

L.H. understands A.H. to be her mother. (R p.12.) The child calls A.H. "Nommy" and knows her as her other parent. (R p.12.) She has close familial bonds with A.H.'s extended family. (R p.12.)

A.H. and M.L. separated in February 2011, and M.L. moved to Kentucky. (R p.12.) A.H. and M.L. continued to co-parent the child, sharing time between A.H.'s home in Cincinnati, Hamilton County, Ohio, and M.L.'s home in Kentucky. (R p.12.)

M.L. has repeatedly affirmed that she relinquished exclusive custodial rights in favor of shared custody with A.H. (R p.12.)

On February 24, 2014, A.H. texted M.L. to work out the logistics for picking up the child for her scheduled visitation. (R p.13.) M.L. responded that A.H. would no longer be allowed to see the child. (R p.13.) A.H. repeatedly tried to contact M.L. about seeing the child and stopped only after M.L. threatened to press charges. (R p.13.)

M.L. And W.R.L. Attempt To Thwart A.H.'s Custody Claim By Filing An Adoption Action, But The Kenton Family Court Permits A.H. To Intervene.

Through her attorney, A.H. wrote M.L., asserting her claim as a co-custodian under both Ohio and Kentucky law, and asking if the parties could "work out an amicable arrangement before getting the court involved." (R pp.13 and 18.) M.L.'s attorney left A.H.'s attorney a message asking to speak before A.H. filed anything. A.H.'s attorney acceded to the request to hold off on filing, and called and left two voicemail messages to M.L.'s attorney that were not returned. (R p.13.) Instead, on April 15, 2014, M.L. and her new spouse, W.R.L., filed a petition for stepparent adoption. (R p.13.) A.H. was not identified in the adoption petition as a person whose consent to the adoption is required. *See* KRS 199.490(1)(h).

A.H. immediately filed a Petition of Shared Custody and Visitation in Hamilton County, Ohio, Juvenile Court, Case No. F11-1692. (R pp. 19-28.) The Hamilton County petition was dismissed after the Magistrate conferred with the Kenton Family Court and agreed that Kentucky would exercise jurisdiction in all matters regarding the child. (Appendix Tab 2, Order of Kenton Family Court, p.2.) A.H. immediately filed a Verified Petition for Joint Custody in Kenton County Family Court (14-CI-1437).

A.H. also filed a motion to intervene in the stepparent adoption proceeding and to dismiss the adoption petition in light of her pending custody petition. W.R.L.'s opposition argued only (1) that a claim to custody must be based on parentage, de facto custodian status, or "written Findings and Conclusions, along with a Decree of Joint Custody;" (2) that A.H.'s situation is analogous to a stepparent who does not adopt and that such a stepparent "does not have any right to that child" – a position he contends "is the law that is in place and has been followed consistently in this and other jurisdictions;" and (3) that *Mullins* is inapplicable because of the written agreement for joint custody that was filed in court in that case.

On July 2, 2014, the Kenton Family Court granted the motions to intervene and to dismiss the adoption petition. With respect to A.H.'s claim that she and M.L. are co-parents to their child pursuant to an agreement they had entered prior to the child's birth, the court found: "[A.H.] cites a litany of poof that such an agreement was contemplated by the parties and that it was their practice both during their relationship and following the termination of the relationship between them." (*See* Appendix Tab 2, Order of Kenton Family Court, p.1.) Based on its factual findings, the court concluded that "[A.H.], the intervening party, has presented a colorable claim to seek custodial rights under *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010)," and that if A.H.'s proof matched her allegations, it "could elevate [A.H.] to the legal status of joint custodian." (*Id.* at p.2.) In light of A.H.'s colorable claim to seek custody, the court found that the petition for adoption was "not currently ripe due to the unresolved issue of [A.H.'s] legal status to the child." (*Id.* at p.3.)

W.R.L. Appeals The Decision Of The Kenton Family Court

W.R.L. appealed, arguing only that (1) A.H. is not a de facto custodian; (2) *Mullins*, and *J.A.L. v. E.P.H.*, upon which *Mullins* relied, do not support A.H.'s custody petition because the same-sex partners in those cases retained lawyers who filed court documents seeking joint custodial rights prior to the dispute; and (3) A.H. cannot satisfy KRS 403.800(13)(b) because she has not been awarded custody, nor does she claim a right of custody under Kentucky law. Notably, W.R.L. made no argument regarding KRS 403.800(13)(a) regarding whether A.H. had custody for six consecutive months in the year prior to filing for custody.

The Court of Appeals reversed, holding that A.H. did not establish for intervention purposes, the validity of her custody claim because, according to the appellate court, A.H. had not demonstrated that she had had "physical custody" of the child for a period of six months within one year immediately before the commencement of the child custody proceeding as required by KRS 403.800(13)(a). (*See* Appendix Tab 1, *W.R.L. v. A.H.*, 2015 Ky. App. LEXIS 52 (Ky. Ct. App. Apr. 17, 2015).) The appellate court reached this conclusion despite Appellees not raising the argument; despite not acknowledging the statutory definition of "physical custody" or this Court's interpretation of that term in *Mullins*; and despite the fact that A.H. has not yet had the opportunity to proceed to trial on her custody petition to prove the extent and nature of her relationship with L.H. and, in particular, whether she has had physical custody of L.H. in a manner that satisfies KRS 403.800(13)(a). Other matters considered by the Court of Appeals even though they were not raised by Appellees include the following erroneous conclusions:

- That A.H. must have standing to adopt in order to be allowed to intervene in an adoption proceeding;
- That KRS 403.802, which provides that the UCCJEA does not "govern" adoption proceedings, means that A.H.'s custody rights cannot support her motion for intervention in an adoption proceeding;
- That A.H.'s interest in a custody proceeding is irrelevant to an adoption proceeding, because the two proceedings have different "subject matters;"
- That the fact that A.H.'s custody claim had not yet been adjudicated in her favor rendered her interest "expectant" rather than a "present" interest;
- That the agreement drawn up by M.L., and signed by the A.H. and the sperm donor, denoting A.H. as a "parent" to L.H. is invalid as the unauthorized practice of law.

But while considering many issues not raised by the parties, the appellate court did not address A.H.'s alternative argument that she was entitled to permissive intervention because her custody petition and the stepparent adoption petition shared questions of law and fact.

ARGUMENT

I. THE KENTON FAMILY COURT ORDER SHOULD HAVE BEEN AFFIRMED BECAUSE KENTUCKY LAW PROVIDES A.H. A SUFFICIENT LEGAL INTEREST UNDER CR 24.01 TO INTERVENE IN THE ADOPTION PROCEEDING.

The Court of Appeals applied the wrong standards in assessing A.H.'s motion to intervene because it ignored governing legal principles, such as this Court's only holding on intervention in adoption proceedings and the statutory definition of "physical custody." It also misread this Court's decision in *Mullins*, relying on incorrect factual

distinctions and, ignoring this Court's construction of what constitutes the "physical custody" necessary to attain standing in a custody proceeding. But the most significant error in the majority opinion of the Court of Appeals below is its failure to consider or even mention the guiding principle in all child custody matters—the best interests of the child. Instead, the concurrence bemoans the law's failure to prioritize the rights of children, acknowledging that precluding the adoption court from hearing A.H.'s evidence and claims regarding the best interests of L.H. "is a harsh result." *W.R.L.*, 2015 Ky. App. LEXIS 52 at *20 (Maze, J., concurring). But, because this harsh result finds no basis under the law, this Court should reverse and permit factual development of A.H.'s custody claim so that a child is not severed unnecessarily from an adult the child has always understood to be a parent.

A. Standing to Intervene in an Adoption Proceeding Is Not Dependent on One's Standing to Seek an Adoption.

The Court of Appeals erred in conflating the right to intervene in an adoption proceeding with standing to adopt.[1] CR 24.01 gives parties an intervention of right and reads in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the

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[1] Curiously, the Court of Appeals' analysis begins by noting correctly that standing and the right to intervention are distinct legal concepts, and that many others have incorrectly conflated the two. *W.R.L.*, 2015 Ky. App. LEXIS 52 at *5 and n.2. Then the opinion nevertheless goes on repeatedly and emphatically to conflate the two concepts. "Standing to intervene in an adoption proceeding, therefore, is tantamount to standing to sue for adoption." *Id.* at *13; *see also id.* at *6 ("if A.H. lacked standing in this case, then the family court's grant of intervention as a matter of right under CR 24.01 constitutes error as a matter of law."); *id.* at *13 ("A.H. would have a right to intervene in this adoption proceeding if the adoption statutes authorized people in A.H.'s shoes to petition to adopt a child situated similarly to that of M.L.'s child."); *id.* at *6 ("it would be clear error to grant relief to a party who lacks standing"); *id.* at *6-7 ("Therefore, we move on to W.R.L.'s challenge to A.H.'s claim of standing").

> applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

The right of a party to intervene in a case is in no way dependent on whether she has standing to assert the exact claim the plaintiff/petitioner in the underlying case asserts (or even the converse of such claim). *See Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004). *Baker* definitively disposes of the notion that A.H. had to be asserting her own right to adopt L.H. in order to intervene. In *Baker,* this Court held that a child's second cousins had a sufficient interest to intervene as of right in an adoption proceeding instituted by the child's foster parents, even though Kentucky statutes did not designate such distant relatives as persons from whom consent was required prior to adoption by someone else, *id.* at 625, and it was undisputed that the cousins were not then eligible to file their own adoption petition. *See id.* at 628 (Keller, J., dissenting) (the second cousins could not assert their own adoption petition because they "did not have the written approval of the Cabinet's secretary, J.A.J. had not been placed with [them] for the purpose of adoption, and, in fact, [they] never made an application to the Cabinet for permission to receive a child for adoption.").

This Court rejected the view, expressed by the dissent in *Baker*, that CR 24.03 required the denial of intervention because the second cousins seeking intervention did not have standing to adopt and did not "include[] a claim for immediate entitlement to custody of J.A.J." nor seek "an order directing the Cabinet to place J.A.J. with them for the purposes of adoption." *Id.* at 629 (Keller, J., dissenting). The dissent viewed the intervention motion as legally insufficient because the second cousins "stated only that they 'seek to intervene in this action to at least temporarily suspend the adoption of

[J.A.J.] until all the facts are discovered.'" *Id.* However, the majority of this Court looked with favor on the intervenors' request that the Family Court pause the adoption proceeding, and held that it was reversible error to deny intervention, vacating the adoption decree with directions that the second cousins be allowed to intervene. *Id.* at 625-26. Notably, the word "standing" does not appear in the majority opinion in *Baker* at all, highlighting that standing to adopt and the interest sufficient for intervention in an adoption proceeding as of right are distinct concepts.

In so holding, this Court was unequivocal that, by allowing intervention, "we are ensuring that all options for a permanent placement are afforded children in need of a home. Evaluating several possible homes only more thoroughly serves the overriding legislative policy of considering the best interests of the child." *Id.*; *see generally P.W. v. Cabinet for Health & Family Servs.*, 417 S.W.3d 758 (Ky. Ct. App. 2013) ("There can be no question that the overriding legislative policy of the pertinent statutes and regulations is consideration of the best interests of children."). The Kenton Family Court's pragmatic approach in allowing intervention is entirely consistent with *Baker*'s focus on ensuring that everyone's interests are taken into account and, in particular, the best interests of the child at the center of this dispute.

By reaffirming *Baker* here, this Court effectively will ensure that no party can use legal procedure to renege on the promises that he or she made to co-parent—promises that were made to safeguard the best interests of the child. In contrast, the approach of the Cabinet in *Baker* and the Court of Appeals here, in turning a blind eye to competing claims of custody, "do[es] a disservice to everyone involved, particularly the child who

may have been denied the opportunity to be raised in a home more suitable to his [or her] needs." *Baker*, 126 S.W.3d at 626.

The Court of Appeals' error stemmed from the fact that it simply ignored this Court's decision in *Baker v. Webb*, which appears in the appellate decision only as a case that the Family Court cited in *its* opinion. *See W.R.L.*, 2015 Ky. App. LEXIS 52 at *4-5. This is especially problematic given that the text of *Baker* notes that this Court was deciding what constituted a sufficient interest for intervention in an adoption proceeding as a matter of first impression.[2] *Baker* remains this Court's definitive opinion on the issue, save for the consistent observation in *Cabinet for Health and Family Services v. L.J.P.*, 316 S.W.3d 871 (Ky. 2010) ("*L.J.P.*"), that, while the grandparents' attempt to intervene in a termination of parental rights hearing was correctly rejected, their hypothetical future intervention in someone else's adoption proceeding would be proper. *Id.* at 874 n.1 ("Should an adoption proceeding be later initiated in a proper manner by the other parties, [Grandparents] would have a right to intervene in that proceeding.").[3]

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[2] *See Baker*, 127 S.W.3d at 624 ("This Court has never specifically addressed a party's intervention as of right in an adoption proceeding.").

[3] While it is unpublished, this Court's only other decision (besides *L.J.P.*) citing *Baker* strongly supports A.H. in this appeal, as it rejects the notion of putting different proceedings involving a child in silos, in favor of ensuring that all evidence and arguments regarding a child's best interests are considered before a decision is made in any one proceeding. *Hammond v. Foellger*, 2007 Ky. Unpub. LEXIS 29 (Ky. Mar. 22, 2007). There, the relatives with whom the Cabinet wanted to place the child, protested the standing and involvement of the foster parent, who was seeking custody. This Court rejected that argument, noting that the Family Court "had the authority and responsibility to hear all matters related to the custody and care of the child. Pursuant to *Baker v. Webb*, the court appropriately allowed Tina Carter to present evidence as to the best interests of the child." *Id.* at *5-6. This Court held that "the primary caregiver and foster parent, had a significant interest in the outcome of the proceedings." *Id.* at *6. This Court deemed "the holding of *Baker*" as not limited to placements with relatives, but instead "that the Court should consider which placement of a child best fits within the best interests of the child." *Id.* at *7.

In keeping with *Baker*, the unanimous *L.J.P.* Court specifically said both that the "Appellees do not at present meet the statutory requirements to have standing to adopt D.J.P." and also that "[s]hould an adoption proceeding be later initiated in a proper manner by the other parties, Appellees would have a right to intervene in that proceeding." 316 S.W.3d at 874 n.1, 877. Thus, in *L.J.P.*, consistent with *Baker*, appellants had the right to *intervene* in adoption proceedings despite not having satisfied the statutory requirements to *file* an adoption petition. The Court of Appeals was thus flat wrong in saying that A.H. needed standing to adopt in order to be allowed to intervene in the adoption proceeding.

Also illustrative of the Court of Appeals' error in insisting that A.H. had to have standing to adopt in order to intervene is *Carter v. Smith*, 170 S.W.3d 402 (Ky. Ct. App. 2004). There, a resident sued Bourbon County for violating Open Meeting Act requirements and sought to invalidate an agreement between the county and a former superintendent and disgorge past payments and enjoin future payments thereunder. The *Carter* court held that the superintendent could intervene under either CR 24.01 ("Intervention of Right") or CR 24.02 ("Permissive Intervention"). *Id.* at 410. Obviously, the Superintendent would not have incentive or standing to seek the same relief harming his interests that the plaintiff sought, and could not bring any competing claim of entitlement to future payments he had not yet earned. Nevertheless, in a case so directly affecting his interests, it was reversible error to deny intervention. *Id.*

It bears emphasis that A.H. sought to intervene in the adoption proceeding for the sole purpose of ensuring that the court did not grant the petition before she could be heard concerning a grant of joint custody in L.H.'s best interests. A.H. did not seek to intervene

to adopt L.H. Thus, the Court of Appeals' assertion that "it would be clear error to grant relief to a party who lacks standing" makes no sense in this context. *See W.R.L.*, 2015 Ky. App. LEXIS 52 at *6. It may be true that one cannot intervene to seek for herself the exact relief sought by the plaintiff/petitioner, if she does not have standing to bring suit for that relief. Nevertheless, one can intervene to seek the "relief" of denying or postponing the relief sought by the plaintiff/petitioner, irrespective of one's standing to attain that relief herself. *See generally Carter*, 170 S.W.3d at 410; *J.L. v. Cabinet*, 2010 Ky. App. Unpub. LEXIS 639 (Ky. Ct. App. Aug. 13, 2010) (rejecting Grandmother's claim that she was improperly denied intervention in an adoption proceeding where she sought to invalidate the adoption 21 months after its finalization because the Family Court effectively allowed intervention, in that it considered her CR 60.02 motion and "disposed of on its merits.").

In sum, the Court of Appeals was wrong in its view that standing to adopt is a prerequisite for intervention in an adoption proceeding – both on the merits of the position, and by raising it *sua sponte*. *See* Sec. III, *infra*.

B. The Facts Underlying A.H.'s Claim of Custody Are Very Similar to, or More Compelling Than, Those Found Sufficient in *Mullins*.

In ruling that A.H. presented a colorable claim to joint custody, the Kenton Family Court cited *Mullins* and doubtlessly was swayed by the fact that A.H.'s relationship to L.H. mirrors that of Ms. Mullins' relationship with her son in that case. Indeed, any differences inure to A.H.'s benefit. Appellees. and the Court of Appeals largely concede this point, except for a couple of distinctions they draw which can charitably be characterized as fanciful, both factually and legally.

1. The Facts of This Case Compare Favorably With Those in *Mullins*.

In their brief to the Court of Appeals, Appellees acknowledged that "many of the factors present in *Mullins* are also present here." Br. of W.R.L. and M.L. at 5. A comparison of the facts of *Mullins* and this case demonstrate the prudence of Appellees' concession:

Facts About A.H.'s relationship with L.H. (All cites are to 2015 Ky. App. LEXIS 52 at *3-4)	Facts About Ms. Mullins relationship with Zachary Picklesimer-Mullins (all cites are to 317 S.W.3d at 572, 576)
M.L. became pregnant by assisted insemination.	Picklesimer conceived through assisted insemination.
M.L. and A.H. were together during the pregnancy, and A.H. was present for the child's birth on September 29, 2006.	The couple was together during the pregnancy, except for a brief breakup, and Mullins was there at the child's birth.
The child was given A.H.'s maternal grandmother's maiden name and A.H.'s middle name and surname.	The child was given the hyphenated last name of the couple.
A.H. took several weeks off work after the child was born.	After Picklesimer's maternity leave expired, Mullins took a one-month leave to care for the baby.
A.H. was involved in all aspects of the child's life, shared child-rearing responsibilities, and provided financial support.	Mullins' care for the child was "in the capacity of a parent, cared for the child from birth until some months after the break-up, when
A.H. is listed as the second parent on medical, childcare, and school forms, and provides health insurance by identifying the child as a dependent. The child was a dependent on A.H.'s 2010 tax return.	
The child knows A.H. as a parent, and has familial bonds with A.H.'s extended family.	The child calls Mullins "momma"

M.L., A.H., and the child lived together as a family unit in Cincinnati, Ohio, until A.H. and M.L. separated in February 2011, and M.L. and her child moved to Kentucky.	Mullins, Picklesimer, and the child lived together for the first ten months of the child's life, before the couple separated.
Despite the separation, M.L. permitted A.H. to continue to spend time with the child for two years before cutting off contact.	Despite the separation, Picklesimer permitted Mullins to continue to spend time with the child for five to seven months before cutting off contact.

There is only one real distinction of significance between this case and *Mullins*: that A.H. spent much more time bonding with L.H., both during the time they lived together in one house (53 months compared to 9-11 months in *Mullins*), and also during the regular parent-child contact that M.L. allowed thereafter before cutting it off (three years compared to 5-7 months in *Mullins*). This distinction militates strongly in favor of A.H. in seeking to preserve strong, longstanding bonds with L.H. Instead, the Court of Appeals seized on the length of time elapsed after the adults' separation and used that against A.H., despite the *Mullins* holding to the contrary, as explained below.

2. The Court of Appeals' Attempt to Distinguish *Mullins* Is Unpersuasive and Based on an Incorrect Summary of the Facts.

The Court of Appeals concocted two distinctions between the facts in *Mullins* and the facts here: "the child lived with the petitioner up to and until the petition for custody was filed and that fact, coupled with an agreed order entered by the court wherein the birth mother partially waived her superior right to custody, gave her standing as a person acting as a parent." *W.R.L.*, 2015 Ky. App. LEXIS 52 at *13 (citing *Mullins*, 317 S.W.3d at 572). The reliance on the "agreed order" in *Mullins* is discussed below in Subsection 3. As for Ms. Mullins living with the child up until she filed for custody, the Court of

Appeals is again flat wrong: Ms. Mullins, like A.H. here, moved out of the house she had shared with Picklesimer and the child months before filing for custody; the only question unresolved is whether it was five, six, or seven months prior to filing the custody action. *See Mullins*, 317 S.W.3d at 573 n.1 ("Picklesimer testified that Mullins left her the day after the agreed judgment was entered [February 3, 2006]. Mullins testified that while the parties were having problems in February 2006, the relationship did not end until April of 2006"); *see also Picklesimer v. Mullins*, 2008 Ky. App. LEXIS 95, at *5 (Ky. Ct. App. Mar. 28, 2008) ("After Mullins moved out sometime in February to mid-March of 2006, she continued regular visitation with Zachary. However, in September 2006, Picklesimer stopped Mullins' contact with Zachary . . . .").

It speaks volumes that we do not know how many months Ms. Mullins moved out before filing for custody; this Court acknowledged but shrugged at the discrepancy regarding the date that Ms. Mullins moved out. If the Court of Appeals' view of Section 403.800(13) were correct, and one does not have "physical custody" of a child during the period after she moves out of the house despite continuing to have regular visitation with the child, then an April move would have kept Ms. Mullins' custody petition alive, while a February move would have been fatal, given the September filing of the custody action. Nevertheless, this Court did not focus on the timing discrepancy, instead asserting that "It was undisputed that Mullins *physically cared for and supervised* Zachary from birth throughout the period the parties were together *and for the five months thereafter when they shared custody*." 317 S.W.3d at 576 (emphasis supplied).[4] This recognition that the

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[4] If a trial court had referred to "the five months thereafter when they shared custody," one could focus on the "five months" and assume the court was resolving a factual issue in favor of the later date that Mullins may have moved out, thus meaning that there were

exact wording choice of the Legislature ("physical care and supervision") had expanded the universe of nonparents with custody standing was echoed by this Court just last year: "Thus, the term 'person acting as a parent' has been redefined, and has been broadened from its original definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding. . . ." *Coffey v. Wethington*, 421 S.W.3d 394, 398 (Ky. 2014).

And it is difficult to overstate the importance of the *Mullins* Court's equating its facts to *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996). *See Mullins*, 317 S.W.3d at 576 ("The facts in *J.A.L. v. E.P.H.*, are nearly identical to those in the case at hand."). In *J.A.L.*, standing was afforded a nonbiological mother who lived with the child and biological mother for the first ten months of the child's life until the couple broke up; for the *two years* thereafter before filing for custody, she visited with the child once or twice a week. *J.A.L.*, 682 A.2d at 1317. Thus, in both this case and the *J.A.L.* case, the nonbiological mothers had regular, mutually-agreed contact with the child for years after the breakup before the biological mother ended contact. Under *Mullins*, a nonbiological parent has standing to preserve the parent-child bonds that have developed after jointly rearing a child under one roof, followed by shared parenting time after a separation.

In holding that A.H.'s post-breakup joint parenting arrangement did not qualify—as a matter of law—to give her "physical custody" of L.H., the Court of Appeals incorrectly failed to consider the statutory definition of "physical custody," which is simply "physical care and supervision of a child." KRS 403.800(14). The Legislature

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seven months in the previous year when Mullins lived with the child full time. But this Court was not in a position to resolve the factual dispute, so the importance of its characterization was that the period after Mullins moved out, but still regularly visited with the child, qualified as "custody" under KRS 403.800(13).

could have defined "physical custody" as the "*primary* physical care and supervision" or the "*exclusive* physical care and supervision," of a child but it did not. Statutory definitions matter, as is reflected in the Commonwealth's legal history regarding the standing of nonbiological parents to pursue custody. For example, in *Consalvi v. Cawood*, 63 S.W.3d 195, 197-98 (Ky. Ct. App. 2001), Chris Cawood, the ex-husband of the mother, who assumed he was the father of the couple's two children, would have been deemed a "de facto custodian" of the two children under any colloquial definition of the term, but not under the Kentucky Legislature's limitation of that term to one who is "*the* primary caregiver" as opposed to merely being "*a* primary caregiver." *Id.* (quoting KRS 403.270 (emphasis supplied by the court)). The same applies in *B.F. v. T.D.*, 194 S.W.3d 310, 310-11 (Ky. 2006) to B.F., who decided along with her partner T.D. to pursue adoption and jointly raise the child, but that T.D. would be the sole adoptive parent due to the couple's concerns that a same-sex couple could not jointly adopt. *B.F.*, 194 S.W.3d at 310-11. This Court acknowledged authority from elsewhere supporting the preservation of bonds between children and those who parent them, but said that "[d]espite her significant relationship to the child," B.F. lacked standing because of the wording of the de facto custodian statute. *Id.* at 312.

A different statute means a different result. The UCCJEA's supplemented the de facto custodian statute with another basis for standing to seek custody, by extending that right to a "person acting as a parent." *Mullins*, 317 S.W.3d at 574-75. After Ms. Mullins moved out of the house, she was still providing "physical care and supervision" of the child during regular visits, in accord with this Court's holding that "physical custody" can

refer not only to "the period the parties were together" but also to the "months thereafter when they shared custody." *Id.* at 576.

The legislature was wise to remove the requirement that a person be an exclusive caregiver to attain standing to seek custody because "[t]he bond between a child and a co-parenting partner who is looked upon as another parent by the child cannot be said to be any less than the bond that develops between the child and a nonparent to whom the parent has relinquished full custody." *Id.* at 579; *see also Olds v. Berry (In re B.B.O)*, 277 P.3d 818, 823 (Colo. 2012) ("[W]e recognize that the term 'physical care' factors in the amount of time a child has spent actually in the care of a nonparent and the psychological bonds that may form as a result."). The result reached in *Mullins* was "necessary 'in order to prevent the harm that inevitably results from the destruction of the bond that develops' between the child and the nonparent who has raised the child as his or her own." *Mullins*, 317 S.W.3d at 579 (citation omitted).

Giving "physical care and supervision" its literal meaning, without restricting it by requiring exclusive or primary care and supervision, not only respects the Legislature's drafting, but serves important policy goals of promoting the child's best interests and encouraging the amicable resolution of the child's care without fear of adverse legal consequences. Imagine a situation where the couple breaks up on January 1, and the nonbiological mother moves out but has regular visitation with the child. If the biological mother breaks off contact on June 29, and the nonbiological mother files a custody action that day, the parent-child bonds could be preserved under the Court of Appeals' logic, but not if the same cutoff and filing occurred on July 2. This makes no sense from the perspective of the child and will lead to the type of procedural

gamesmanship seen in this case. Moreover, such a regime would compel any cautious nonbiological parent to reject an amicable resolution for continued relationship with the child, because any legal recourse would be lost if he or she did not initiate a custody proceeding within six months after the separation. Instead, under *Mullins*, allowing the period after cohabitation ends but regular contact continues to be deemed "physical custody" because "physical care and supervision" occur comports with the statute and with the overarching goals of family law and judicial efficiency, while the Court of Appeals' approach subverts all those goals.

3. Unlike in this Case, There Was No Legally Valid Writing in *Mullins* Reflecting the Couples' Intent that Both Be Considered Parents.

Appellees' attempt to rely on the fraudulent, void ab initio "agreed order" in *Mullins* regarding joint custody, while attempting to impugn the worth of the agreement that M.L. herself prepared, and the sperm donor and A.H. signed, declaring A.H. to be a "parent" to L.H. is unpersuasive. *See* M.L. Resp.to Pet. For Discretionary Rev. at 9 (arguing that, despite many similarities, Mullins is distinguishable "in a very significant way"; *viz.*, the filing of the Petition, Entry of Appearance, and Agreed Judgment purporting to confer joint custody rights on Mullins). Neither Appellees nor the Court of Appeals, which also cited the *Mullins* "agreed order," acknowledge that it was declared void and of no legal effect under CR 60.02 by the trial court, the Court of Appeals, and this Court. *See Mullins*, 317 S.W.3d at 576-77. A void order purporting to grant joint custody is of less significance in determining standing to claim custody than is a perfectly valid writing by the biological mother stating that parental status is conferred on the biological mother. Moreover, Appellees' attempt to elevate the importance of the

existence of a writing as a prerequisite to finding a waiver of a biological parent's superior right to custody is unavailing. *See id.* at 578 (noting that "no formal or written waiver is required" in the inquiry to determine whether the biological parent has waived her superior right to custody).

Still more puzzling is the Court of Appeals' legally unsupportable rejection of the signed writing in this case as the unauthorized practice of law. The Court of Appeals improperly held that the contract was invalid: "This document has no legal relevance to and little bearing upon our analysis other than as descriptive of the facts of the case and, furthermore, it is unenforceable. It was prepared by M.L., a non-lawyer, presumptively intended to affect the rights of two other persons and, therefore, constitutes the unauthorized practice of law." *W.R.L.*, 2015 Ky. App. LEXIS 52 at *3 n.1. But it is well-established that a nonlawyer can draw up a contract to which she is a party or is a beneficiary, as reflected by being named in the document. *See* CR 3.020; *Carter v. Brien*, 309 S.W.2d 748, 749-750 (Ky. 1956) (a nonlawyer properly may, without consideration, "draw[] the paper but he must be a party to, or his name must appear in, the instrument as one to be benefited thereby.") It is only the unauthorized practice of law when a person draws up an instrument that does not involve him or her. CR 3.020. On its face, the instrument drawn up by M.L. reflects an intent to benefit her and A.H. by purporting to eliminate any claim of parental rights by the presumed biological father.

But, of course, people cannot draw up contracts that make binding allocations of parental or custodial responsibilities for a child; such agreements always remain subject to a court's determination of the child's best interests. It is legally appropriate, however, to apply the agreement to estop M.L. from opposing A.H.'s custodial rights on any

grounds other than the child's best interests. *See, e.g.*, *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013) (holding that agreement entered by biological mother to share custody of children born through assisted insemination was enforceable, and remanding for best interest determination); *Dunkin v. Boskey*, 82 Cal. App. 4th 171, 189-90 (2000) (enforcing parenting and support contract is consistent with public policy, including support of children); *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. Ct. App. 2000) (lesbian de facto parent had standing to seek custody based on parties' agreement and best interests of child). Indeed, in Ohio, where M.L. and A.H. lived at the time they entered their agreement, longstanding precedent establishes that agreements such as this one, whether oral or written, and regardless of whether an attorney drafts them, are enforceable subject to the child's best interests. *See, e.g.*, *Hobbs v. Mullen (In re Mullen)*, 953 N.E.2d 302, 306 (Ohio 2011).

In one respect, however, the fraudulent, void "agreed order" in *Mullins* and the waiver here share an important common feature, irrespective of their legal effect—they both are evidence of the biological mother's intent that her partner be treated as though she were a parent in matters of custody. *Mullins*, 317 S.W.3d at 581("Even though the agreement was properly found to be invalid, we nevertheless believe it was relevant to show Picklesimer's intent to confer parental rights to Zachary on Mullins.").

C. The Strength of A.H.'s Custody Claim Satisfied the Requirement of a Sufficient Legal Interest Under CR 24.01.

While it is unclear which rationales were necessary to its holding, the Court of Appeals articulated three reasons why A.H. should have been denied intervention, no matter how compelling her custody claim is: (1) the UCCJEA, including its provision affording standing to a "person acting as a parent" does not "govern" adoption

proceedings; (2) the "subject matter" of this proceeding was adoption, not custody; and (3) because there is currently no decree awarding A.H. custody, her interest is merely "expectant" or "contingent." *W.R.L.*, 2015 Ky. App. LEXIS 52 at *8-15. None of these rationales undermines the basic premise that intervention in an adoption proceeding should be afforded one who has a clear legal right to have a tribunal assess her claim affecting the child's custody.

The Court of Appeals read too much into the statute providing that the UCCJEA "does not govern" adoption proceedings. *See* KRS 403.802. Many courts have recognized the wisdom of holding the adoption proceedings in abeyance pending the resolution of other proceedings affecting the child's custody. *E.g.*, *Thomas v. Cabinet*, 57 S.W.3d 262, 264 (Ky. 2001) ("The McCracken Circuit Court held DeWeese's adoption of Maggie in abeyance until the Thomas' could seek relief in the appropriate court" from the Cabinet's decision not to place Maggie in the Thomas's home along with Maggie's siblings); *In re Adoption of Pushcar*, 853 N.E.2d 647, 649 (Ohio 2006) (" . . . a probate court must refrain from proceeding with the adoption of a child when an issue concerning the parenting of that child is pending in the juvenile court."); *D.B. v. M.A.*, 975 So. 2d 927, 935-36 (Ala. Civ. App. 2006) ("It is clear that before continuing with the child's adoption the issue of the child's custody must be resolved.") While the Kenton Family Court had subject matter jurisdiction over the stepparent adoption, it was entirely appropriate to grant intervention and dismiss the petition, so that A.H.'s custody petition could be adjudicated first.

The Court of Appeals missed the mark for two reasons in its characterization of A.H.'s interest in custody as irrelevant to an adoption proceeding. *W.R.L.*, 2015 Ky. App.

LEXIS 52 at *8 ("the subject matter of this case is not custody, but adoption."). First, Kentucky intervention law respects an intervenor's judicially recognized interest in the underlying subject affected by the action. *See* CR 24.01 ("an interest relating to the property or transaction which is the subject of the action").[5] Second, the development of the "one family, one judge" principle in Kentucky family law strongly supports the Family Court's grant of intervention.

The Court of Appeals derived the wrong lesson about intervention from *L.J.P.* in its overly narrow assertion that "[t]he 'subject matter' of a proceeding is key in determining standing," *see W.R.L.*, 2015 Ky. App. LEXIS 52 at n.6, when in fact it is the subject matter, possible remedies, finality, among other aspects, that affect the suitability for intervention. *L.J.P.* reaffirmed the propriety of allowing intervention in adoption proceedings—but not a termination proceeding—for parties with legally recognized claims for the care and custody of the child. *L.J.P.*, 316 S.W.3d at 876 (stating that *Baker* held that second cousins could intervene in an adoption proceeding "[b]ut these authorities do not create a substantial interest in a *termination* proceeding.") (emphasis in original); *id.* at 877 ("Given that the proceeding before the court was for termination, and not adoption, Appellees' motion to intervene was correctly denied . . ."); *see also id.* at 874 n.1. The court below ignored the specific lesson of *L.J.P.* that certain proceedings

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[5] It is true that *Baker* cited *Gayner* for the proposition that an intervenor must have an interest in the subject matter of the litigation. 127 S.W.3d at 624 (quoting *Gayner v. Packaging Service Corp. of Ky.*, 636 S.W.2d 658, 659 (Ky. Ct. App. 1982)). However, the distinction between an interest in the particular legal claim advanced, as opposed to the underlying object or transaction, was not the focus of either decision, and there is no authority of which A.H. is aware holding that an interest satisfying the language of CR 24.01 is invalid if the intervenor cannot also demonstrate an interest in the subject matter of the litigation itself. Indeed, the authority is to the contrary. *See Carter*, 170 S.W.3d at 410.

like termination, which is narrow in focus and contemplates further court action, are generally inappropriate for intervention, while other proceedings, like adoptions, with a broad inquiry and lasting, significant effects on the child's relationships, are amenable to intervention by interested parties. *Id.* at 876 (noting that, if termination occurs, "at that point in time, [Grandparents] have further options."); *id.* at 874 n.1 (specifically noting that one of those options is intervention in an adoption proceeding).

Thus, the Court of Appeals misapplied the law of intervention by narrowly identifying the subject matter of the action as simply the nature of the legal claim itself, which is an unnecessarily cramped and unsupportable interpretation of the law of intervention. If this approach were applied in other contexts it would lead to absurd results, as reflected in *Carter*, 170 S.W.3d at 404. There, the "subject matter" of the complaint brought by a resident of Bourbon County was "six violations of the Open Meetings Act." *Id.* Shortly after filing the complaint, the plaintiff resident moved to amend, seeking to void the county's consulting contract with its former superintendent, which had been entered during the challenged meetings, and seeking to enjoin future payments, and an order requiring the superintendent to repay past sums to the district. *Id.* at 405. The superintendent intervened, and candidly admitted no interest in the subject matter of the litigation—namely, whether the Open Meetings Act was violated—stating that he "he had no reason to intervene until the amended complaint brought his consulting contract into dispute and further payments under the contract were enjoined. His goal in intervening was to protect his interest in the consulting contract." *Id.* at 408. The *Carter* court held that it was reversible error to deny intervention. *Id.* at 410. Thus, as a matter of

intervention law, the attempt to cast a custody proceeding as wholly separate from and irrelevant to adoption proceedings concerning the same child is wrong.

The silo approach to custody and adoption also is misguided as a matter of Kentucky family law. "Kentucky has moved toward a unified family court, a court specializing in, and with jurisdiction to address, a broad array of legal problems confronting families." *Morgan v. Getter*, 441 S.W.3d 94, 105 (Ky. 2014) (citing KRS 23A.100). "These 'new' family courts are administratively capable of providing a coordinated response when families find themselves before the court with respect to multiple matters." *Id.* The fact that the Legislature has endorsed the consolidation of all matters affecting a given child's custody should counsel in favor of taking cognizance of competing proceedings, as opposed to the "continued compartmentalization of the proceedings—before the same judge [that] works only to disadvantage some litigants without a sound reason for doing so." *Mauldin v. Bearden*, 293 S.W.3d 392, 400 (Ky. 2009). "When a family court is involved, custody is a single issue, subject to several different statutory schemes. So long as a family court is acting within its statutory authority, it makes little difference what docket is involved." *Id.* The compartmentalization point made in *Mauldin* underscores other benefits of the Family Court's order allowing intervention: promoting "judicial economy" and increasing the diversity of perspectives brought to bear on the analysis of the child's best interests, given that "neither party to the [adoption] action has any reason to represent or protect [A.H.'s] rights." *See Carter*, 170 S.W.3d at 410.

The correct analysis would be to recognize that the subject matter of an adoption action includes the custody, care, and above all, the best interest of a child. As a person

whom the child knows to be her mother, A.H. clearly has an interest in the "subject matter." The appellate court's determination to the contrary should, therefore, be corrected.

The appellate court's determination that A.H.'s interest in the custody of her daughter, reflected in her petition for joint custody, was too speculative to provide her with the right to intervene is inconsistent with the plain language of the intervention statute. CR 24.01(b) (intervention of right granted "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"). The Kenton Family Court correctly acknowledged this Court's holding in *Baker*, which vacated a final adoption decree and required that relatives (second cousins) be allowed to intervene in an adoption proceeding, despite the fact that their entitlement to adopt was far from certain, given that "the statute and regulations do not mandate that the Cabinet choose a relative placement over other options" and merely "require that the Cabinet consider relatives in its determination of proper placement." *Baker*, 127 S.W.3d at 625. Indeed, the *Baker* Court even pointed out why the second cousins might not be ideal. *Id.* at 626 n.2 (" . . . the child has now resided and presumably bonded with the Webbs for nearly two years. The Cabinet will have to take this fact into consideration . . ."). Similarly, the *L.J.P.* Court specifically took "no position as to whether placing a child with his grandparents would be in the best interest of the child." 316 S.W.3d at 877. Intervention in adoption proceedings was deemed appropriate in those cases, even though the relatives did not have a definitive legal right to adopt and might well be rejected on proper consideration.

What was not acceptable in *Baker* or *L.J.P.*—and should not be acceptable here—is for an adoption proceeding to go forward without hearing from a party who, pursuant to recognized principles of law, has a right to be heard regarding the adoption, custody, and care of a child.

Moreover, the Court of Appeals' logic, requiring a final favorable adjudication of custody would exalt procedural gamesmanship over the welfare of the child at the heart of an adoption petition. A.H. is asking a court to recognize and enforce what has been true for years—that she is now, and always has been, the co-custodian of her daughter as a result of an agreement with the biological mother to rear their child as co-parents from birth. A.H. cannot be faulted for not having secured a custody decree at the time she sought intervention, given that both parties were honoring an agreed-upon division of time with L.H., until M.L. unilaterally cut off contact, asked A.H. to hold off on filing the custody action that A.H. warned of, and then ran to court to file the stepparent adoption petition. In *Baker*, at the time that the second cousins sought intervention, they did not satisfy the prerequisites for adoption, but seemingly due not to their fault but the Cabinet's in failing to consider them for placement. 127 S.W.3d at 625. *Baker* rejected the notion that courts should penalize either the child, by not providing a full hearing regarding his or her best interests, or those who seek to maintain a relationship with a child who rely on the assurances of others that there is no need to take immediate action. *Id.* at 626.

In their opposition to Appellant's motion to intervene in the Kenton Family Court proceedings, Appellees' incorrectly suggested that A.H.'s situation is akin to a stepparent who had not adopted their spouse's child. The stepparent analogy is inapposite here,

where A.H. and M.L. jointly decided to bring L.H. into the world together, and L.H. therefore was the intended child of two parents from the beginning. However, even on its own terms, Appellees' assertion about the universal rejection of stepparents' right to continue relationships with their former stepchildren is questionable. *See Debbie L. v. Galadriel R. (In re Victoria R.)*, 201 P.3d 169, 176-77 (N.M. Ct. App. 2008) (citing several jurisdictions as allowing for stepparent claims for continued contact). In Kentucky, the question may not be resolved. W.R.L. cites no Kentucky authority, and this Court ruled in *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979), that a stepparent had a right to seek visitation post-divorce. While that holding was superseded during the period when the de facto custodian statute was the sole basis for a nonparent to claim custody, *see B.F.*, 194 S.W.3d at 312 n.5, the ability of stepparents to seek continued contact appears to be at least an open question in Kentucky, given KRS 403.800(13) and *Mullins*, 317 S.W.3d at 579, for those stepparents who can establish the necessary case-by-case showing of a legal parent's waiver of his or her otherwise superior right to custody. In Ohio, the body of law protecting the custodial rights of functional parents pursuant to shared custody agreements similarly makes no exception for stepparents who can satisfy the "case-by-case" inquiry that his/her spouse has relinquished his/her superior right to custody in favor of shared custody in the best interest of the child. *See In re Mullen*, 953 N.E.2d at 306.

In short, for all the reasons stated above, this Court should reverse the Court of Appeals because the Kenton Family Court did not commit "clear error" in allowing intervention, *see Carter*, 170 S.W.3d at 409, and indeed was entirely correct in so doing.

II. THE KENTON FAMILY COURT ORDER SHOULD HAVE BEEN AFFIRMED BECAUSE PERMISSIVE INTERVENTION UNDER CR 24.02 WAS APPROPRIATE GIVEN THE COMMON FACTUAL AND LEGAL ISSUES.

The Court of Appeals also erred by not even considering whether the Family Court's order was sustainable as permissive intervention under CR 24.02. A.H. invoked both sections before the Family Court and on appeal.[6] CR 24.02 provides:

> Upon timely application anyone may be permitted to intervene in an action: . . . (b) when an applicant's claim or defense and the main action have a question of law or fact in common.

CR 24.02(b). In *Ipock v. Ipock*, 403 S.W.3d 580 (Ky. Ct. App. 2013), the Family Court allowed the child's guardian ad litem in the child's neglect action and the Cabinet to intervene in a divorce proceeding because of newly discovered evidence that the husband was not the child's father. *Id.* at 582-83. The Court of Appeals held that intervention under CR 24.01 was improper, but upheld permissive intervention under CR 24.02, because the trial court correctly determined that the father's parentage and custody was a common legal and factual question in the neglect and divorce actions. *Id.* at 584-85. Similarly here, the adoption petition and A.H.'s custody claim are completely intertwined, sharing critical questions of law and fact, including who emerges from such proceedings with the authority to make decisions for the child.

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[6] It is clear that the Family Court relied on CR 24.01 in allowing intervention; it is less clear whether it relied on CR 24.02, although it seemingly did rely on the common legal and factual questions between the two proceedings. *Compare* CR 24.02 (intervention permissible "when an applicant' claim or defense and the main action have a question of law or fact in common" *with* Appendix Tab 2 at p.3 (finding the adoption petition unripe "due to the unresolved issues of [A.H.]'s legal status to the child"). The Court of Appeals should have considered A.H.'s argument that the order was sustainable as permissible intervention under CR 24.02, because as it acknowledged, an "appellate court may affirm on any ground supported by the record." *W.R.L.*, 2015 Ky. App. LEXIS 52 at *16 (citing *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013)).

But more fundamentally, if A.H. establishes in her custody action that M.L. waived her right to sole custody in favor of shared custody with A.H. then, as this court recognized in *Mullins*, the two "must share decision-making" concerning the child. 317 S.W.3d at 579. Unilaterally consenting to a stepparent adoption is not joint decision-making and should not occur if A.H. prevails on her custody petition. The family court recognized this, noting: "Whether a child should be adopted clearly would be classified as a major decision concerning the child's upbringing." (Appendix Tab 2 at p.2.) As a result, the family court correctly permitted intervention, dismissed the adoption petition as not yet ripe and turned its attention to the custody petition to determine if A.H.'s claim had validity.

III. THIS COURT NEED NOT CONSIDER ANY OF THE ISSUES NOT RAISED BY APPELLEES THAT WERE INJECTED INTO THIS LITIGATION BY THE COURT OF APPEALS.

None of the rationales offered by the Court of Appeals for reversing the Kenton Family Court passes muster. However, this Court need not even consider those issues that were injected into consideration by the Court of Appeals but not raised by Appellees. The law is well-settled in Kentucky that, unless the issue goes to the subject matter jurisdiction of the courts, an order of a trial court can be affirmed for any reason supported by the record, but should be reversed only for preserved errors. *See Fischer v. Fischer*, 348 S.W.3d 582 (Ky. 2011); *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010). Certainly, an attack on A.H.'s standing explicitly has been held by this Court not to go to subject matter jurisdiction, and thus falls under the general waiver rule. *Id.* A.H. is unaware of any reason that would justify departure from this rule, given that Appellees were represented by counsel at all stages of this action.

As such, this Court need only consider—and can easily dispose of—Appellees' preserved arguments regarding (1) the "agreed order" in *Mullins*; (2) whether A.H. is more akin to a stepparent than she is to Ms. Mullins, and (3) whether A.H. asserts a claim to custody under Kentucky law in satisfaction of KRS 403.800(13)(b).

CONCLUSION

A.H. respectfully requests that the Court reverse the Court of Appeals, thereby reinstating the legal effect of the Kenton Family Court order.

Respectfully submitted,

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**Admitted Pro Hac Vice*